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Issue Date: 30 April 2004

In the Matter of

Stacey M. Platone,
Complainant,

v.

Atlantic Coast Airlines
Holdings, Inc.,
Respondent.

Case No.: 2003-SOX-00027

RECOMMENDED DECISION AND ORDER[1]

This proceeding arises from a complaint filed by Ms. Stacey M. Platone against Atlantic Coast Airlines Holdings, Inc., alleging violations of the employee protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. § 1514A (hereinafter "the Act"). Enacted on July 30, 2002, the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Security Exchange Act of 1934 (15 U.S.C. 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C 78o(d)). Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. § 42121(b). 18 USC § 1514A(b)(2)(B).

On April 2, 2003, the Complainant, Stacy M. Platone, filed a Sarbanes-Oxley whistleblower complaint with the Occupational Safety & Health Administration (OSHA), U.S. Department of Labor. After conducting an investigation, OSHA's regional director issued two letters dated July 18 and 22, 2003 advising the parties that Ms. Platone's complaint lacked merit. Subsequently, Ms. Platone filed her objections with the Office of Administrative Law Judges, U.S. Department of Labor. A formal hearing was held before me in Washington, D.C., on November 14, 17, 20, and December 16, 2003, at which times the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the

[1] Citations to the record of this proceeding will be abbreviated as follows: "Tr." refers to the Hearing Transcript; "CX" refers to Complainant's Exhibits; and "RX" refers to Respondent's Exhibits.

hearing, Complainant's Exhibits 1-5, 7-11, 13, 18, 20, 22, 28, 29, 32, 33, 37, 38, 40, 41, 44, 46, 47, 50, and 52-55, Respondent's Exhibits 1, 4-8, 15-17, and 19, and ALJ Exhibit 1 were admitted into evidence. The parties submitted post-hearing briefs pursuant to an Order Establishing Briefing Schedule dated January 15, 2004. I have reviewed and considered these briefs in making my determination in this matter.

STATEMENT OF THE CASE

Atlantic Coast Airlines Holdings, Inc. is a publicly traded company incorporated in the state of Delaware with its executive offices located in Dulles, Virginia. Its stock is registered on the NASDAQ National Market under the symbol ACAI. Atlantic Coast Airlines Holdings, Inc.'s (hereinafter "ACAI") wholly-owned subsidiary, Atlantic Coast Airlines (hereinafter "ACA"), is a steadily growing regional airline carrier established in 1989 with over 5,000 employees, including almost 1,600 pilots. Atlantic Coast Airlines recently announced the creation of its new identity and low-fare airline, Independence Air, which will operate out of Washington Dulles International Airport beginning in early 2004.

ACA's senior management is comprised of over a dozen individuals, including a few who serve simultaneously on ACAI's board of directors: Mr. Kerry Skeen is the Chairman of the Board of ACAI and the Chairman & CEO of ACA; and Mr. Thomas Moore is a member of the Board of Directors of ACAI and President & COO of ACA. Mr. Moore is the direct supervisor of the labor relations department at ACA, who in turn reports directly to Mr. Skeen. Mr. Skeen has the authority to hire, fire, promote, or demote anyone within ACA's management.

Both parties introduced an assortment of documentary evidence in an attempt to illustrate the airline's precise corporate identity. Specifically, the record includes a multitude of various corporate manuals, press releases, SEC filings, Web pages, employment offer letters, and tax forms with either ACAI's or ACA's corporate logo and title generically affixed to the top or within the body of the document. The Respondent maintains that ACAI's logo and official title is used on most of its corporate letterhead in an effort to conveniently include the entire Atlantic Coast Airlines family of corporate entities under similar policies and directives.[2] Complainant, however, alleges that the corporate logos for both ACA and ACAI are used interchangeably because there is no practical distinction between the two entities.

The Form 10-K filed by ACAI with the Securities and Exchange Commission for the year ending December 31, 2002, describes ACAI's business as follows:

> Atlantic Coast Airlines Holdings, Inc. ("ACAI"), is a holding company with its primary subsidiary being Atlantic Coast Airlines ("ACA"), a regional airline serving 84 destinations in 30 states in the Eastern and Midwestern United States and Canada as of March 1, 2003 with 850 scheduled non-stop flights system-wide every weekday. ACA operates under its marketing agreements as both a United Express carrier with United Airlines, Inc. ("United") and as a Delta Connection carrier with Delta Air Lines, Inc. ("Delta"). ACA's United Express and Delta Connection operations are conducted throughout the Eastern and Midwestern

[2] In fact, ACAI has only one operating subsidiary, ACA.

> United States as well as Canada. Unless the context indicates otherwise, the terms "the Company", "we", "us", or "our" refer herein to Atlantic Coast Airlines Holdings, Inc. As of March 15, 2003, the Company operated a fleet of 142 aircraft "112 regional jets and 30 turboprop aircraft" having an average age of approximately 3.6 years.

(CX 1, p. 5). The Form 10-K also indicates that "the Company derives substantially all of its revenues through its marketing agreements with United and Delta, operating under their United Express and Delta Connection brands, respectively." *Id.*

The Form 10-K describes the "Company's" fleet, as well as aircraft on order, and indicates that as of March 1, 2003, the "Company" had 4,311 full-time and 504 part-time employees. The Form 10-K describes the collective bargaining agreement entered into between the "Company" and its pilots, which are represented by the Airline Pilots Association (ALPA), its flight attendants, represented by the Association of Flight Attendants (AFA), and its aviation maintenance technicians and ground service equipment mechanics, represented by the Aircraft Mechanics Fraternal Association (AMFA). It reflects that the "Company" has entered into agreements for pilot training involving simulators, and describes its internet website. *Id.* at p. 12.

According to ACAI's Form 10-K, the "Company" is under pressure to control and reduce costs, and has approached ALPA to negotiate wage reductions and work rule changes through voluntary concessions, noting that in order to achieve its cost reduction goals, the "Company" will require cooperation from its employees, major vendors, and code share partners. *Id.* at p. 18. The Form 10-K includes "Selected Consolidated Financial and Operating Data" for the years 1998 through 2002. *Id.* at p. 24.

As set out in ACAI's Form 10-K, the pilots employed by the "Company" are represented by ALPA, which is a major labor union for airline pilots from over 40 airlines in the United States and Canada that is responsible for the collective bargaining activities of 60,000 airlines pilots. (Tr. 36, 37). On a regular basis, the members of ACA's management team (often referred to as "management") meet and negotiate with members of ALPA (often referred to as "labor") to iron out various details, concessions, amendments, and other business related to the union's labor contracts and collective bargaining agreements. Within its management team, ACA has a labor relations group set up primarily to work directly with the various unions, including ALPA. The labor relations group is headed by Jeff Rodgers, Senior Director of Labor Relations and Planning.[3] Mr. Rodgers was the Complainant's immediate superior and supervisor during her employ with the airline. Like many typical "management-labor" relationships, both ACA and ALPA respectively place individuals in "point" positions whose jobs are to manage the regular and direct interactions between labor and management.

Captain John Swigart, a pilot for ACA, testified at the hearing. Captain Swigart became a negotiating committee member in November 1995, and was elected as Chairman of the Master Executive Council (MEC) for ALPA in March 1999 (Tr. 60, 61). As MEC Chairman, Captain

[3] Within ACA's corporate structure, Mr. Rodgers reports directly to Thomas Moore, who in turn reports directly to Kerry Skeen.

Swigart dealt directly with ACA management on a regular basis; his primary point of contact at ACA was the Senior Director of Labor Relations, Jeff Rodgers (Tr. 66).

According to Captain Swigart, after September 11, 2001, many in airline management were seizing the opportunity of fear to try to coerce pilots to give up pay and benefits. In his capacity as MEC Chairman, he met in weekly conferences with other MEC chairmen from other airlines to discuss these issues, and his union was approached by ACA management to negotiate new side letters of agreement (Tr. 64, 65). In his view, there was no doubt that cost cutting was an issue for management after September 11; the company was in a cost cutting mode, and had threatened to fire pilots out of seniority order (Tr. 65). Eventually, the union was able to work out concessionary side letters of agreement on cost issues (Tr. 65).

Ms. Platone also testified at the hearing. Before she began working for ACA, Ms. Platone worked for ALPA as a pilot communications specialist (Tr. 190), where she was responsible for communicating airline-specific and industry news to members of the union and the media. In January 2001, Ms. Platone met Captain Swigart, who was at that time the Chairman of the MEC for ALPA. At the time, ALPA had just reached a tentative agreement with ACA for a new collective bargaining agreement, which was scheduled to go to the membership for a vote (Tr. 190, 191). Ms. Platone worked on the "road shows," where the agreement was presented to the membership, working with Captain Swigart and Captain Jerry Smith, the Vice Chairman of the MEC. Over the course of these road shows, the three became friends (Tr. 193).

Captain Swigart testified that in the spring or summer of 2002, Ms. Coulter, the Director of Operations at ACA, told him that her position might open up, and that he should consider it. In June, he told Mr. Rodgers that he would be stepping down as MEC Chairman, and that he thought that the Director of Operations position might be available in the future (Tr. 69, 70). That same summer, ACA management created a new position within its labor relations department, Manager of Labor Relations, a position designed to create another point of contact between labor and management. Mr. Rodgers told Captain Swigart about this new position, and asked him for suggestions. In turn, Captain Swigart told Ms. Platone about the new position, and that ACA wanted "fresh blood," someone with firm knowledge of the collective bargaining contract (Tr. 193). Captain Swigart told Mr. Rodgers that he had a candidate for the new position, and showed him Ms. Platone's resume (Tr. 430, 431). Ms. Platone also e-mailed her resume to Mr. Rodgers, and subsequently met with him, as well as Michael Davis, Michelle Bauman, Brian Mooney, and Cathy Bradley at ACA. Ms. Platone did not explicitly mention to anyone at these meetings that she had a close personal relationship with Captain Swigart (Tr. 197). Captain Swigart testified that Mr. Rodgers was aware that he and Ms. Platone were friends, but he did not know if Mr. Rodgers knew about their romantic relationship (Tr. 69-73).

Ms. Platone was interviewed for the position of Manager of Labor Relations in July of 2002 by a number of individuals from different departments within ACA management. During the interview process, Ms. Platone met with Mr. Rodgers; Thomas Moore; Michael Davis, at the time the Senior Vice President of Operations; and Michelle Bauman, at the time the Director of Employee Services and current Senior Director of Systems Control. Each individual expressed concern to Ms. Platone about her ability to make the direct move from ALPA to ACA;

specifically, whether she could be loyal to ACA after working for the ALPA labor union. Ms. Platone testified that during her hiring interviews, Mr. Rodgers specifically asked her how she felt about switching from the "dark side," and whether she would have a hard time changing sides, as she had friendships and personal relationships with persons in the MEC (Tr. 198, 199). Mr. Rodgers similarly testified that he had concerns about Ms. Platone's ability to switch sides, and that others involved in the hiring process also expressed such concerns. Ms. Platone assured him that she was loyal to the organization that employed her, and Mr. Rodgers was satisfied with that answer (Tr. 431-433). Ms. Bauman, who thought that Ms. Platone would do a good job in the position, also had some reservations about her ability to cross over. She expressed these concerns to Mr. Rodgers and to Ms. Platone, and she too was satisfied with Ms. Platone's response (Tr. 616). Ultimately, every individual who interviewed Ms. Platone was satisfied with her qualifications and assurances regarding her loyalty, and recommended her employment.

According to Ms. Platone, Mr. Rodgers told her that Captain Swigart spoke very highly of her work. Earlier, Captain Swigart had told her and Captain Smith that ACA wanted him to start distancing himself from the union. Both Captain Swigart and Captain Smith started taking steps to bring their pilot qualifications current, so that they could resume flying "on the line," and Mr. Rodgers helped them get into a class in July. During the interview meetings with Ms. Platone, Mr. Rodgers asked questions about Captain Swigart and Captain Smith going back to flight school, and repeatedly asked about Captain Swigart's intentions, and whether he was really leaving his leadership position with the MEC. He indicated to her that he had helped Captains Swigart and Smith get back into class so they could become current (Tr. 198, 300). She asked Mr. Rodgers not to tell anyone else that Captain Swigart and Captain Smith planned to leave the MEC, as it was not yet public knowledge (Tr. 201).

In contrast, Mr. Rodgers stated that in the summer of 2002, he had no indication that Captain Swigart intended to leave his position as MEC chairman, and that he only learned about this in October 2002 (Tr. 441, 546).[4] He did not recall talking with Ms. Platone during the interview process about Captain Swigart leaving the MEC chairman position, or even that Captain Swigart's or Captain Smith's name came up (Tr. 551). He noted that after Captain Swigart announced that he was leaving, he still seemed to have some involvement in ALPA business (Tr. 443).

Captain Swigart left his position as MEC Chairman in October 2002, and played no further official role in the union or MEC (Tr. 75). He did play an informal role in the transition to a new Chairman, and occasionally advised the union on contractual questions (Tr. 76, 77). Captain Swigart was the author of most of the previous contract, and thus Captain Thomas, who succeeded him as MEC Chairman, asked him to come to the ALPA offices in early January 2003 for the national meeting, to talk about a concessionary package (Tr. 79).

Not long after her interview process, Ms. Platone received a letter from Mr. Rodgers with the offer of the job, setting out her salary and start date, dated July 23, 2002, on the letterhead of "Atlantic Coast Airlines Holdings, Inc." (Tr. 204, 205; CX 2).

[4] Mr. Rodgers did acknowledge that he helped Captain Swigart get into a training slot (Tr. 545).

Mr. Rodgers told Justine Yingling, who worked part time as a labor relations specialist, that he had hired Ms. Platone for the position, and that she came from ALPA.[5] Ms. Yingling was concerned, but Mr. Rodgers told her that they had been over that with Ms. Platone, and he was confident that there would be no problems. Mr. Rodgers told Ms. Yingling that he was thankful she would still be in the department, that she was a loyal supporter, and that if she ever saw anything that raised concerns, she should come talk to him (Tr. 748).[6]

On August 19, 2002, the Complainant began working for ACA as the Manager of Labor Relations. As the point person for management, Ms. Platone was responsible for directly dealing with the various labor unions associated with ACA, including ALPA; she handled negotiations, grievances, and labor contract interpretations. Because of her position, Ms. Platone was often privy to confidential, sensitive, and proprietary information known only to members of ACA management.

At the heart of Ms. Platone's Sarbanes-Oxley claim is an issue that first arose in September, 2002: flight loss pay. "Flight loss" is the term given to the process by which ALPA reimburses ACA for costs incurred to pay pilots who are called away from flight duties in order to attend official ALPA business. Although somewhat more complex, flight loss simply shifts the cost of paying pilots from the company to the union: when a pilot member of ALPA leadership has particular union business to which she must attend, she can request to be removed from the airline flight schedule for that day. Because she is removed from a previously scheduled flight, the pilot attending ALPA business is still compensated by ACA as if she had completed the flight. In the meantime, ACA must find and pay a reserve pilot to pick up the flight now left empty by the pilot attending the ALPA business. This system costs ACA $20,000-25,000 per month. Fortunately for ACA, the collective bargaining agreement allows the airline to bill ALPA for the flight loss compensation it pays out to those pilots removed for ALPA business each month. In other words, "labor" and "management" have agreed that ALPA will bear ACA's pilot costs on those days the pilots are away on union business.

According to Captain Swigart, when pilots are removed from scheduled trips to do union work, the company bills the union. However, if that day was the pilot's day off, the union does not compensate the company (Tr. 81-82). Captain Swigart testified that when he was the MEC Chair, he was aware that there had been instances where an MEC member incurred flight loss pay because he switched a day off for a scheduled trip, and then dropped it for union work, but the union did not pay the pilot in those instances. He testified that his MEC Vice Chair ruled over the flight loss issue with an iron fist (Tr. 83).

Tiffany de Ris is ACA's Manager of Crew Resources; she is in charge of processing pilots' time cards, answering crew requests, and awarding vacations (Tr. 711). Problems with flight pay loss were brought to her attention in July or August 2003, when something did not seem right, and in September, they really started looking at the issue (Tr. 714). According to Ms.

[5] In October of 2002, Justine Yingling was a Labor Relations Specialist. Since Ms. Platone's termination by ACA, Ms. Yingling has assumed the role of Manager of Labor Relations.

[6] According to Ms. Platone, Ms. Yingling told her that Mr. Rodgers instructed her to spy on Ms. Platone, but when she confronted Mr. Rodgers, he denied it (Tr. 333).

de Ris, there was a discrepancy between the hours that ACA submitted for billing, and the hours that ALPA had on record (Tr. 715). Because Ms. Platone worked directly with the ALPA members, Ms. de Ris informed her of the discrepancies (Tr. 715). According to Ms. de Ris, ACA was billing ALPA on a quarterly basis, based on a verbal agreement (Tr. 715). Initially, Ms. Platone instructed the Crew Resources department to hold off on any further investigation and assured them that she would look into it. Ms. de Ris did not send the next bill to ALPA (Tr. 716).

In her position as manager of labor relations, Ms. Platone was not responsible for anything having to do with flight pay loss (Tr. 215). But in late October 2002, Ms. Platone discussed the flight records discrepancies with Jeff Rodgers and her subordinate, Justine Yingling, and they agreed that Ms. Platone and Ms. Yingling would set up a system to track flight loss. Ms. Platone felt that, even though tracking flight loss was not within her normal duties as Manager of Labor Relations, she was in a suitable position to help the airline resolve the billing problem with ALPA (Tr. 215, 216). Mr. Rodgers initially expressed concern about the flight loss discrepancies, and supported Ms. Platone's efforts to set up a tracking system. As she tracked flight loss over the next month, Ms. Platone regularly reported her findings to Mr. Rodgers, who told her not to share the information with ALPA.

Captain Chris Thomas, who succeeded Captain Swigart as MEC Chairman, called Ms. Platone with concerns about how the flight loss pay system worked (Tr. 368). According to Ms. Platone, Captain Thomas was confused about who was authorized to make a request to be removed from the flight schedule, and the procedure for requesting removal (Tr. 216). She advised him that as the MEC Chairman, he could designate people to request removal from the flight schedule, and that he should just let ACA know who these persons were. She told him that any requests should be submitted by e-mail so that there would be a record (Tr. 218). She also talked to Captain Thomas about the multi-step procedure and form that she and Ms. Yingling had created (Tr. 218).

According to Ms. Platone, after Captain Thomas took over as the MEC chairman, he called on Captain Swigart in November and December for advice. But in January 2003, after Captain Thomas called Captain Swigart to ask him what he should do with ACA's request for concessions, the two had a falling out (Tr. 347-348). She acknowledged that she had made comments to her staff comparing Captain Thomas unfavorably with Captain Swigart, for instance, that the MEC under Captain Thomas was spending more money than Captain Swigart had when he was MEC chairman; that the union had a car, and was spending money on hotel rooms. In addition, Captain Thomas and Captain Hunt received raises from 92 to 103 hours a month. Mr. Rodgers asked her to do a spreadsheet to see if this was costing the company money, but when she tried to produce it, Mr. Rodgers told her not to worry about it (Tr. 353-354).

Mr. Rodgers testified that the flight loss pay system was mismanaged, and that no one was keeping account of the pilots' time off; he wanted to establish a tracking system (Tr. 451). Although he was aware that Ms. Platone and Ms. Yingling were working together on this issue, he did not recall that he specifically gave them this responsibility. He did state that he asked them to look into whether the union was up to date in payments, and they advised him that the

union was several months behind. He asked Ms. Platone and Ms. Yingling to see how far behind they were, and to go ahead and bill them (Tr. 452-453).

Since Captain Thomas had asked for her help, Ms. Platone worked with Ms. Yingling on a new trip drop request procedure for ALPA business. Ms. Platone thought it would be beneficial for ACA to have clear, reconciled records of trip drops each month, so that their bill to ALPA would be paid without challenge (Tr. 223). She sent a memorandum outlining the procedure by e-mail to Mr. Rodgers, with a form and instruction sheet (Tr. 221, 222; CX 20). She sent another e-mail to Mr. Rodgers on November 6, 2002, indicating that she was determined to put something in place, and that it would be very beneficial to ACA for tracking and billing purposes; she asked for his feedback (Tr. 225; CX 22). Mr. Rodgers subsequently left a copy of the attachments on her desk, with a notation of "no," that it was ACA's work, and none of ALPA's business (Tr. 218).

In the first week of December, Ms. Platone met with Ms. de Ris, Ms. Hobcroft, and Ms. Purdue to discuss the status of flight pay loss for ALPA and ACA. Ms. Platone testified that she and Ms. Yingling wanted to share the new tracking system they had developed, and see if they could help the other departments with their tracking for flight loss pay (Tr. 219, 220, 269). As it turned out, there were no problems with flight attendant billing (Tr. 272). Ms. Platone testified that she told them that ALPA had not been billed since May 2002, and that they should get everything out up to October, and give her the rest of the records (Tr. 270).

Ms. Platone did not receive the requested records and again asked for that information, including timecards, billing statements, and backup materials, in a subsequent "flight loss" meeting in January of 2003 (Tr. 271-272). According to Ms. Platone, Ms. de Ris told her that they had not provided her with the requested records because they were working on a training program so that Ms. Platone could take over the billing (Tr. 273). At the time of the January meeting, the flight loss bills had still not been sent to ALPA.

Ms. Platone learned from Ms. de Ris in February that ALPA had still not been billed for flight loss, and she told her to get the bills out (Tr. 274). Finally, in late February of 2003, by doing her own research, Ms. Platone obtained and was able to review some of the "flight loss" records on her own; she never actually received the records she requested from the crew resources department until March 7, 2003 (Tr. 275-278).

After almost three months of tracking flight loss, Ms. Platone believed that some members of the ALPA union leadership were improperly taking advantage of the flight loss system for their own monetary gain. According to Ms. Platone, pilots have the opportunity in advance to review their upcoming schedules and make necessary changes. Three of the four pilots she initially identified were members of the ALPA scheduling committee, and helped create the schedules each month (Tr. 259). Ms. Platone alleges that some ALPA members were purposefully asking to be assigned for a trip on days they were originally scheduled to have off from the ACA flight schedule—days on which official ALPA business also happened to be scheduled, thereby entitling those pilots to flight loss compensation. Because the pilots knew they would be removed from the flight schedule to attend ALPA business, they could deliberately rearrange their schedules to have a flight assigned to them on a day they had never

intended to work. In short, ACA was paying pilots flight loss compensation on days it should not have been. In some circumstances, pilots were allegedly receiving an additional 20% of their salaries as a result of the flight loss abuse.

From her very preliminary review of the records she had managed to obtain, which included such bidding materials as timecards, schedules, and crew track materials, Ms. Platone identified Mike Rops, Tim Newkirk, Ricky Faruque, and Phil Forestburg as individuals whom she thought were abusing the flight loss system (Tr. 249, 252-253). With respect to Mr. Rops, Ms. Platone testified that the master schedule for January 2003 showed that he was off on January 8, 2003, and when he received the schedule, he knew that he was off on that day (Tr. 257).[7] Yet Mr. Rops timecard for January 2003 showed that he was taken off flying duties on January 8 for union business (Tr. 255). According to Ms. Platone, she knew this was not a regularly scheduled day of work for Mr. Rops, because it did not count toward his guarantee; indeed, the time was above guarantee. This indicated that it was originally scheduled as a day off, but Mr. Rops added it to his schedule, and was later removed for ALPA business (Tr. 256).

Specifically, Ms. Platone noted that Mr. Rops was scheduled for training in January, with travel on January 13, and training on January 14 and 15. She found it odd that he was removed from the schedule, as it was unusual to remove a pilot who was scheduled for training, which is required by the FARS (Tr. 260-261). According to Ms. Platone, such a removal is uncommon, unless the pilot is sick and has a note from a doctor. Simulator training is expensive, and the time is at a premium (Tr. 262). The master schedule showed that Mr. Rops performed ALPA business on January 13 and 16, and was paid at the reserve rate. This did not make sense to Ms. Platone, and she felt that she needed more information (Tr. 263).

Ms. Platone also noted that the records showed that on January 28 and 29, Mr. Rops was paid above guarantee, which should not have happened. Additionally, the bid award showed that he was off on those days, but picked up reserve days, and then was removed for ALPA business (Tr. 264). All in all, Ms. Platone identified five days that were questionable with respect to Mr. Rops, which represented approximately twenty percent in additional salary paid to Mr. Rops (Tr. 267-268).

It took several days for Ms. Platone to review the records for the four pilots, and in the last week of February, she shared her discoveries with her supervisor, Mr. Rodgers, and expressed concern about getting a handle on the situation (Tr. 266). She told Mr. Rodgers that ALPA had been billed only through September. Mr. Rodgers was also concerned, and told her to talk to accounting to find out what ALPA had paid and what they had been billed. Although she left numerous messages and e-mails requesting this information from the accounting department, Ms. Platone was never provided with this information (Tr. 276).

According to Ms. Platone, these four pilots were the only ones whose records she was able to thoroughly review. She was concerned that there were others, as there are more than fifty people in the MEC (Tr. 406). She testified that she provided the names of these four pilots to

[7] According to Ms. Platone, a pilot gets the schedules in the middle of the month for the next month, and has to bid for trips. The schedules come out at the end of the month, with trips being given to the most senior pilots. Mr. Rops was a junior pilot (Tr. 252-253).

Mr. Rodgers and Ms. Schep, the Director of Crew Scheduling, in the first week of March (Tr. 250).

During the following week, on March 3, 2003, Ms. Platone sent an e-mail to Jennifer Schep,[8] asking for her thoughts and advice about the alleged flight loss abuse (Tr. 280). She also sent an e-mail to Mr. Rodgers asking for his input (CX 28). He told her that if the national union was not paying the company for pilots on their days off, the company would not pay the pilot; Ms. Platone asked him what she should do (Tr. 281). Ms. Platone testified that she also called Ms. Kitty Lee in accounting about dropped trips; Ms. Lee told her that it was a blatant violation of ALPA policy, and that these pilots were considered to be "scum" at ACA (Tr. 280).

According to Mr. Rodgers, during the week of March 3, Ms. Platone sent him an e-mail stating that there was a group of pilots dropping trips, and the company was not being reimbursed by the union. She did not identify any specific individuals, although he recalled that she later identified Captain Faruque (Tr. 454). He testified that this was the first time he was aware of allegations of improper use of flight pay loss (Tr. 560). According to Mr. Rodgers, he asked Ms. Platone how she wanted to pursue it, but he did not recall telling her to draft a letter. He viewed the matter as an "initial concern" that needed to be addressed. But if the company got assurances from the union, and there was no evidence of any wrongdoing, he felt that they needed to move on (Tr. 560).

The following day, March 4, MEC Chairman Chris Thomas, who was a longtime friend of Ms. Platone's, showed up at her office, closed the door, and asked her what she was doing, and why she was so hot on the flight loss issue (Tr. 281). Ms. Platone explained to him that she was simply trying to straighten things out. Captain Thomas told her that she knew ACA did not have the resources to track flight loss, but she reminded him that they had spoken in November about tracking flight loss, and that she had created a spreadsheet to track it (Tr. 282). According to Ms. Platone, Captain Thomas was upset (Tr. 284).[9] Ms. Platone told Captain Thomas that she was investigating the matter with the best interests of ACA in mind. She also warned him that "flight loss" abuse was a violation of ALPA's constitution and by-laws that could result in expulsion for unethical and improper practice (Tr. 379).

Mr. Rodgers sent Ms. Platone an e-mail on March 5, stating that until Captain Thomas sent a document stating that ALPA would pay for pilots' days off, the company would not pay the pilots (Tr. 383). Ms. Platone subsequently spoke on the telephone with Captain Thomas, and asked him for something in writing stating that if pilots traded trips ALPA would cover it. Captain Thomas told her he did not need to do that (Tr. 382, RX 7).

Ms. Platone testified that she then talked to Mr. Rodgers, telling him that she wanted to make sure ACA was covered; they discussed Ms. Platone writing a letter to memorialize the

[8] Ms. Schep is also known and referred to throughout the record as Jennifer Tripp.

[9] Ms. Platone had previously spoken with Captain Thomas about a pilot who was removed from the schedule after picking up a trip on his day off, and she told him that was not "kosher" policy. In addition, Captain Thomas and Captain Rops had asked her to remove another pilot from the schedule, and she disagreed with them about whether that was appropriate. In connection with this issue, Ms. Platone consulted Captain Swigart, Captain Smith, and Captain Fox, who supported her interpretation (Tr. 282-283).

company's position (Tr. 284-285, 385). Mr. Rodgers, however, did not recall ever telling Ms. Platone to write such a letter to Captain Thomas (Tr. 458). In fact, he testified that he was not aware that the company had not been reimbursed for dropped trips; he intended Ms. Platone to focus on what ALPA owed the company, and when they would pay (Tr. 460-461).

According to Mr. Rodgers, on Wednesday, March 5, Captain Thomas sent an e-mail to the MEC committee members, advising them that the union would not tolerate anyone acting unethically by picking up trips and later dropping them for ALPA business. Captain Thomas then called Mr. Rodgers, and told him that he understood that there were some accusations against him and other union members, and that he was looking into it. He assured Mr. Rodgers that ALPA would pay for flight loss, and that he was not aware of any inappropriate behavior by committee members (Tr. 456). After these assurances, Mr. Rodgers felt that it clearly was an internal ALPA issue; it was their committee, and their money. Further, he did not feel that there was any evidence that committee members picked up trips knowing that they would have to drop them later for ALPA business (Tr. 458

In line with her discussion with Mr. Rodgers, Ms. Platone prepared a letter to ALPA leadership, to make them aware that the company would bill them to bring pilots back on dead head trips for union business, and to discuss the issue of trip pickups on days off. Her draft cited to the flight loss rules in the ALPA administrative manual, and discussed the policy on flight loss (Tr. 285-288; CX 32, 33). On March 6, 2003, Ms. Platone relayed her draft letter to Mr. Rodgers via e-mail for his review (CX 32, 33).

Earlier that same day, March 6, Captain Thomas and Captain Rops met with Mr. Rodgers. According to Mr. Rodgers, Captain Thomas stated that he was having difficulty working with Ms. Platone. Mr. Rodgers' recollections were vague; he recalled that they discussed something about vacation, and two or three other issues. He did not remember if they discussed the flight pay loss issue (Tr. 447).[10] This was the first time Mr. Rodgers had heard of any problems with Ms. Platone. According to Mr. Rodgers, and contrary to Ms. Platone's understanding, Captain Thomas and Captain Rops did not tell him that they would not work with the company's labor relations department if Ms. Platone was still there (Tr. 447, 562). He did not believe that the problem was Ms. Platone's investigation of flight loss, and in fact he did not recall if the issue of flight loss or trip drops came up at all in the meeting (Tr. 563).

Ms. Platone sent her e-mail regarding the flight pay loss issue, with her draft letter, to Mr. Rodgers later that day. Mr. Rodgers testified that he did not recommend sending the letter because there was no evidence of any intentional wrongdoing. He felt that the letter was too strong. Additionally, he felt that this was an internal ALPA issue; Captain Thomas had assured him that his investigation found no wrongdoing, and that the company would get reimbursed for trips (Tr. 460). According to Mr. Rodgers, he had asked Ms. Platone to focus on the bigger issue of whether the union owed money to the company; if there was something there, he wanted her to show him the evidence, but he did not want her to accuse someone of unethical behavior. He testified that he asked Ms. Platone how she could tell if a pilot was deliberately picking up flights, and then dropping them for union business. Ms. Platone sent him an e-mail on this issue,

[10] Indeed, although Captain Thomas had sent him an e-mail about flight pay loss the day before, and called him to discuss it, Mr. Rodgers could not recall the subject of flight pay loss coming up on this day (Tr. 568-570; CX 29).

but he felt it did not cover all areas. He testified that he was not aware of any detailed information on Captains Rops, Faruque, Forestburg, or Newkirk (Tr. 574-575).

Mr. Rodgers testified that he did not know if he called Captain Thomas after receiving this e-mail from Ms. Platone, but he acknowledged that his cell phone records reflected a call to the MEC office at 6:06 p.m. that day (Tr. 566-567).

On March 7, 2003, just days before ACA and ALPA were scheduled to engage in concessionary negotiations, Mr. Rodgers responded to Ms. Platone by telling her that he was not interested in sending the letter to ALPA. Ms. Platone was taken aback, and thought that she had touched a nerve. Later that day, Ms. Platone approached Mr. Rodgers and asked him if she should "take another stab" at writing the letter. According to Ms. Platone's testimony, he replied, "Don't bother," and instructed her not to do anything else. At that time, Ms. Platone knew she had hit a nerve (Tr. 288). Mr. Rodgers testified that because there was no evidence of any intentional wrongdoing, and because any potential "flight loss" abuse was strictly an "internal ALPA issue," he did not want to send the letter to ALPA. Later that day, Ms. Platone received an e-mail from Mr. Rodgers, asking her to remove the members of the ALPA negotiating committee from the flight schedule for the following week, so that they could re-engage in concessionary negotiations (Tr. 289). Mr. Rodgers did not tell her about the meeting that he had just had with Captains Rops and Thomas (Tr. 571-572, CX 32).

According to Ms. Platone, at that time the company was in desperate circumstances: United, which accounted for 85% of the company's business, filed for bankruptcy in December 2002. The company needed a new contract with United that would cut costs. Ms. Platone stated that very few cost items can be controlled. Although the company did a good job with aircraft costs, they were still faced with fuel and labor costs. In December, in negotiations with ALPA, the company was obsessed with getting concessions from the pilots (Tr. 306-307). In her view, by creating a system for accounting and tracking flight loss for the company, this process would be consolidated, billing would be easier, and future abuses would be prevented (Tr. 307). In this context, she viewed Mr. Rodgers' instruction not to send the letter, and that he did not want to talk about the issue anymore, as inconsistent with the "cutting all costs" mode; it did not make sense to her that something that was so beneficial for the company would be stopped dead in its tracks (Tr. 309). She thought that if the company let the issue go, the pilots would give concessions, which they ultimately did (Tr. 310).

On Saturday, March 8, 2003, while Ms. Platone was with Captain Swigart, Captain Swigart received a phone call on his personal cell phone from his successor as MEC Chairman, Chris Thomas. Mr. Thomas indicated that there was a problem with Ms. Platone, that she was a "filter" for the MEC, and that the airline was investigating her. Mr. Thomas told Captain Swigart that Mr. Rodgers had her phone records (Tr. 142). Captain Swigart then spoke with Ms. Platone, who mentioned something about flight loss (Tr. 142). According to Ms. Platone, Captain Swigart told her that Captain Thomas was in Mr. Rodgers' office the day before, that Mr. Rodgers had showed him her phone records, and that she should be worried about her job (Tr. 291). Captain Swigart told her that Captain Thomas said that she was harping about billing issues; when Captain Swigart asked him what he was talking about, Captain Thomas said "this whole flight loss thing," that she was pushing it. When Captain Swigart asked why it was a

problem, Captain Thomas said that it just was. After the telephone call, Captain Swigart asked Ms. Platone about it. She told him that she was trying to get something straightened out with the company and the union; she also told him about the letter she had drafted, and Mr. Rodgers' reaction (Tr. 291, 392).

Confused, Captain Swigart immediately called Jeff Rodgers, and asked him why Ms. Platone was under investigation, and whether her phone records were being reviewed. Mr. Rodgers claimed that he knew nothing about it and in fact enjoyed working with Ms. Platone (Tr. 143). At the start of his conversation with Mr. Rodgers, Captain Swigart mentioned he was concerned because he was dating Ms. Platone; he testified that Mr. Rodgers did not express shock at this disclosure (Tr. 144-145). Mr. Rodgers claims that that was the first he had heard of their romantic relationship, and he was not quite sure how to handle it or whether their relationship was considered inappropriate.

Mr. Rodgers' recollection was that Captain Swigart called to tell him that he was dating Ms. Platone, and that he had told the MEC he was not, so that they would leave him alone. At the end of the conversation, Captain Swigart asked him if he could do anything to help with problems with the current MEC, and in helping them understand issues surrounding the company (Tr. 463). According to Mr. Rodgers, he asked Captain Swigart to educate the new MEC. He only vaguely remembered Captain Swigart mentioning a phone call from Captain Thomas. Mr. Rodgers testified that this was the first he had heard that Ms. Platone and Captain Swigart were dating, and he was "stunned." However, he did not express this disbelief to Captain Swigart, because he had been caught off guard. He did call Ms. Bauman and leave her a voice message describing the call, and on Monday, he talked to Mr. Moore about the fact that Ms. Platone was dating Captain Swigart (Tr. 462-465). Mr. Rodgers testified that he was very much bothered by the news that Ms. Platone was dating Captain Swigart. He felt betrayed, after he had protected her from previous complaints (Tr. 466). He also testified that he knew of no investigation of Ms. Platone; he did not recall looking at her phone records (Tr. 462). However, he did testify that on March 10, he reviewed Ms. Platone's e-mails (Tr. 514).

Ms. Bauman confirmed that in early March, on a weekend, Mr. Rodgers called her to say that he had additional concerns about Ms. Platone's performance, and some new information. They spoke the following Monday; Mr. Rodgers was concerned about performance issues related to communication. But his primary concern was a telephone call he had received advising him that Ms. Platone had a relationship with a previous MEC Chair. He was concerned about Ms. Platone's ability to do her job, and felt that he could not trust her anymore (Tr. 618). She was surprised when she found out that the person was Captain Swigart; Mr. Rodgers told her that it was the first he had heard of it. Ms. Bauman was concerned because of the nature of Ms. Platone's position, and the type of information to which she potentially had access (Tr. 619). She testified that she told Mr. Rodgers that he needed to document the performance issues and discuss them with Ms. Platone, as well as the relationship issue. She recommended that he talk with her about the performance issues first, and then about the relationship.

According to Mr. Rodgers, Ms. Bauman and Mr. Steindler came to his office to discuss this issue. They recommended that he conduct two separate meetings with Ms. Platone, one to

focus on performance issues, and one to focus on her relationship with Captain Swigart (Tr. 467).

On the following Monday, March 10, 2003, Ms. Platone met with Mr. Rodgers to discuss what had happened over the weekend. Mr. Rodgers also spoke with Tom Moore on March 10th regarding Ms. Platone and her relationship with Captain Swigart. According to Ms. Platone, Mr. Rodgers indicated that ALPA was upset because she was harping on billing issues. Ms. Platone had never heard any complaints of her inability to get along with ALPA before this time (Tr. 294). Nor did Mr. Rodgers indicate to her that he had just learned of her relationship with Captain Swigart (Tr. 293-294).

Mr. Rodgers' recollections of this meeting were vague; he remembered only that they discussed two or three issues, and that he told Ms. Platone about the issues that Captains Thomas and Rops brought up (Tr. 564). But he did not recall telling Ms. Platone that the MEC or ALPA leadership would not work with the company if Ms. Platone was still there. He testified that he was satisfied with the outcome of the meeting (Tr. 468). Concessionary negotiations took place as scheduled on Monday, March 10 (Tr. 295).

On Tuesday morning, Ms. Platone received a call from Captain Thomas, stating that he wanted all of the ALPA negotiating people put back on the trip schedule. Ms. Platone asked if he was sure, and Captain Thomas told her that they had nothing left to discuss with the company. Ms. Platone called Mr. Rodgers, and asked why Captain Thomas was being so quick about this; Mr. Rodgers told her to put them back on the flight schedule (Tr. 295-296). Later that day, Tuesday, Mr. Rodgers called Ms. Platone into his office, and told her that ALPA was upset with the billing issues, and felt that she was obstructive, and would not continue to work with the company while she was there (Tr. 296-297). Again, Ms. Platone was sure that she had touched a nerve with her letter (Tr. 297). Mr. Rodgers then told her that he had received a call from Captain Swigart, who told him that they were dating. Ms. Platone advised him that this was personal, but that they could talk about it. She told Mr. Rodgers that she was upset that all of a sudden the union was making a big issue of the fact that she was dating Captain Swigart, when they already knew about it (Tr. 298-299). Ms. Platone told Mr. Rodgers that his comments sounded threatening and hostile, at which point Mr. Rodgers terminated the meeting and called Ms. Bauman, the Director of Employee Services, to tell her about Ms. Platone's accusations of hostility so that an investigation could commence (Tr. 469). Ms. Bauman called Ms. Platone a few hours later, and scheduled a meeting for the following day (Tr. 303). According to Ms. Bauman, it is a common practice for the employee services department to investigate any allegations of discrimination (Tr. 621).

According to Mr. Rodgers' version of this meeting with Ms. Platone, he told Ms. Platone about the telephone call from Captain Swigart, and asked her what she could do to make him feel comfortable about their relationship (Tr. 468). Ms. Platone responded that she could not. She also claimed that ALPA was always out to get her, and that she felt that she was working in a hostile and threatening environment. At that point, he called Ms. Bauman (Tr. 469). Mr. Rodgers testified that Ms. Platone did not make any allegations of wrongdoing by ACA in either meeting (Tr. 470).

On Wednesday, March 12, 2003, Ms. Platone met with Ms. Bauman and Susan Davis to discuss what had transpired over the previous week, in order to officially register a complaint (See CX 53). According to Ms. Platone, she told them that she was trying to get to the bottom of the flight pay loss issue, and that she thought the pilots were cheating the company out of money. She told them that Mr. Rodgers had twice told her that ALPA was mad because she was harping on billing issues. She also testified that she told Ms. Bauman and Ms. Davis that she had discussed writing a letter with Mr. Rodgers, but when she wrote it, nothing happened (Tr. 304). Ms. Platone told Ms. Bauman that she feared retaliation by Mr. Rodgers, as he was the one who relayed the threat from the union, and he knew what she was doing with flight loss, but did not protect her. She told them that she knew that there was a problem, but for some reason Mr. Rodgers wanted to cover it up (Tr. 404-405).

Ms. Bauman testified that, since Ms. Platone told her that she had given the information about the flight pay loss issue to Mr. Rodgers, she assumed that it had been investigated, and she did not ask any further questions of Mr. Rodgers.

According to Ms. Bauman, Ms. Platone was very uncomfortable at this meeting. They told her that they would be starting an investigation, and needed to ask questions (Tr. 622). Ms. Platone told them that she was not comfortable talking with them, that people in the company had a lot of friends, and she did not want to talk further. She stated that someone in the company had it out for her, and did not want her to get the job. When pressed, she identified Ms. Yingling, Ms. Schep, and Ms. Powell. She also told them that ALPA was trying to get her out of her job (Tr. 623, 627). According to Ms. Bauman, Ms. Platone stated that she had no issues with Mr. Rodgers, and enjoyed working with him. She mentioned the issue of flight pay loss very briefly, saying that she felt very bad, because she did not want to hurt the company. But she had found out that ALPA was taking money they were not entitled to (Tr. 628).[11] Ms. Bauman testified that towards the end of the conversation, Ms. Platone stated that ALPA was treating her poorly and making her job difficult, and did not want her to be in her job because of her relationship with Captain Swigart (Tr. 629). Ms. Platone would not tell them how long she had had a relationship with Captain Swigart (Tr. 630).

Ms. Bauman testified that they asked Ms. Platone to provide a written statement documenting her concerns, and explaining why she felt that she was working in a hostile environment, and documenting the information that she disclosed during the meeting. No statement was received from Ms. Platone before she was terminated (Tr. 630-631).

Mr. Rodgers testified that after this meeting, Ms. Bauman told him that Ms. Platone had complimented his management, but stated that she had a conflict of interest, and felt that she was ineffective (Tr. 471). He subsequently met with Ms. Platone and Ms. Yingling to discuss a grievance, but he was very uncomfortable, and felt that there had been a breach of trust (Tr. 473).

Ms. Bauman concluded that no actionable discrimination had occurred, and the problem was simply rooted in a few individuals not getting along. According to Ms. Bauman, there was a

[11] In fact, Ms. Davis's notes of this meeting, produced for the first time at the hearing, refer to flight pay loss at least three times. They also indicate that Ms. Platone told them that Captain Thomas told Mr. Rodgers that he could not work with Ms. Platone (Tr. 689).

conference call that week with herself, Mr. Steindler, Ms. Belcher, and Mr. Petesch about the conflict of interest and lack of trust issues (Tr. 632). Mr. Davis was concerned because there were many things going on at the company that involved the union, and the company was getting ready for negotiations, which meant that there was a lot of sensitive information that potentially could be passed on. He was also concerned that Ms. Platone did not disclose the relationship when she was hired (Tr. 633). Ms. Bauman felt that Ms. Platone's personal relationship with Captain Swigart was incompatible with the proper discharge of the duties of her specific job (Tr. 634).

Mr. Rodgers testified that initially, the company decided to suspend Ms. Platone until they could figure out if they wanted to terminate her (Tr. 473). He claimed that he spoke to Ms. Bauman about finding Ms. Platone another position in the company, but Ms. Bauman felt that the situation was too far gone, there had been a breach of trust, and Ms. Platone could no longer work there. Mr. Rodgers did not recall discussing the flight pay loss issue during these meetings, and testified that these allegations did not enter into his decision to suspend Ms. Platone (Tr. 474, 479). Ms. Bauman also testified that the issue of flight pay loss did not enter into the discussion, and no one mentioned it (Tr. 636). According to Ms. Platone, when she asked why she was being suspended, she was not given a reason. She asked if it was because the union was upset about flight loss, but they refused to answer (Tr. 373).

Mr. Rodgers testified that he did not recall telling Captain Thomas that Ms. Platone was going to be suspended before the date it actually happened, and would not acknowledge telephoning him right after Ms. Platone was in fact suspended. However, he agreed that his telephone records reflect that Ms. Yingling was the first person he called after Ms. Platone was suspended, and that he then called the MEC telephone number (Tr. 599-601).

On March 19, 2003, Ms. Platone met with Robert Steindler and Emma Belcher, who told her that she was being terminated because of her relationship with Captain Swigart (Tr. 365). According to Ms. Platone, she told them that Mr. Rodgers knew about the relationship, but never said anything, and that during the phone conversation on March 8, he told Captain Swigart that he did not have a problem with it (Tr. 367). Mr. Rodgers testified that the conflict of interest presented by this relationship was "one of the reasons" that Ms. Platone was terminated (Tr. 509). He testified that the circumstances surrounding a grievance by Captain Fox were also a factor in the decision to fire Ms. Platone (Tr. 538, 604-605). He testified that in general, there was a lack of trust of Ms. Platone (Tr. 604-605). According to Mr. Rodgers, he did not bring up Ms. Platone's concerns about flight loss, and he had no reason to believe that Ms. Belcher or Ms. Davis were aware of Ms. Platone's concerns (Tr. 598, 609).

Mr. Steindler testified that he was notified by Ms. Bauman that Ms. Platone was involved in an intimate relationship with Captain Swigart, the former MEC Chair (Tr. 846). He had discussions with Mr. Rodgers, Ms. Bauman, and Ms. Belcher, the main gist of which was that this relationship represented a conflict of interest, and created a lack of trust and confidence in Ms. Platone remaining in her position. Both he and Ms. Bauman recommended suspension and ultimately her removal (Tr. 847-848). It was Mr. Steindler's understanding that Ms. Platone was in this relationship when she was hired, but that she did not divulge it. Given her level at the company, and Captain Swigart's position at ALPA, and the natural relationship between union

and management, he felt that this was a conflict that should have been disclosed from the beginning (Tr. 848). According to Mr. Steindler, the issue of flight pay loss was never discussed, and Mr. Rodgers never pressed him to recommend termination (Tr. 849-850).

Mr. Steindler testified that the termination meeting with Ms. Platone was very short. They told her that based on her failure to disclose the relationship, there was a lack of trust and confidence in her continued employment, and the decision had been made to terminate her. He recalled that Ms. Belcher also mentioned that there were other performance issues, and that Captain Fox's name "came up" (Tr. 851-852).

Although Captain Swigart stepped down as MEC Chairman in October of 2002, Mr. Rodgers and Mr. Moore believed that he was still active behind the scenes in ALPA business, and could learn of confidential information through Ms. Platone. Although Mr. Rodgers knew of no instances in which Ms. Platone shared confidential information with Captain Swigart, he feared she could no longer be loyal to ACA. Although Respondents introduced evidence that a member of the mechanics' union and others had had difficulty working with Ms. Platone, the Respondents maintain that Ms. Platone was terminated because they could no longer trust her.[12] Mr. Rodgers insisted that the "flight loss" abuse issue played no role in the airline's decision to terminate Ms. Platone. At the hearing, Mr. Rodgers cited to the airline's company policy manual in support of the decision to terminate Ms. Platone; he claimed that she was improperly engaged in a personal relationship that was incompatible with the proper discharge of her duties (RX 6). At the hearing, Ms. Platone and Captain Swigart maintained that everyone at ALPA and ACA knew about their romantic relationship. However, every witness called on behalf of Respondents denied knowing for a fact that the two were romantically involved.

In addition to the relationship between Ms. Platone and Captain Swigart, the Respondents presented additional testimony purportedly bringing Ms. Platone's loyalties into question. The purpose of this evidence was not clear, as none of these incidents were identified as reasons for firing Ms. Platone, and indeed they had been satisfactorily dealt with in her evaluation in the fall of 2002. Captain Swigart admitted discussing airline business regularly with Ms. Platone, but made it clear that he and Ms. Platone never discussed confidential information. Ms. Platone admitted helping Captain Swigart draft and/or edit an ALPA hotline message directed to its members while he was MEC Chairman and she was working for ACA (RX 7). Ms. Platone explained she had assisted Captain Swigart with similar messages while she worked at ALPA, and insisted the August, 2002 message was beneficial to ACA as an attempt to reduce the number of grievances filed by pilots against ACA. Respondents presented testimony that Captain Swigart was once involved in a pilot grievance in October 2002 while he was MEC Chairman and Ms. Platone was Manager of Labor Relations. And finally, as MEC Chairman, Captain Swigart also participated in a labor contract implementation meeting with Ms. Platone across the table. Even so, Mr. Rodgers testified he knew of no instances in which Ms. Platone shared confidential information with Captain Swigart.

[12] Kirk Taylor, a member of the aircraft mechanics union, testified that he had a poor working relationship with Ms. Platone during one particular grievance because Ms. Platone took a hard-line stance on behalf of ACA. Ms. Yingling and Ms. Schep had also complained about Ms. Platone to Mr. Rodgers regarding her performance and professionalism. All of the complaints were eventually resolved to Mr. Rodgers' satisfaction.

Contrary to the Respondent's justifications, Ms. Platone contends that she was terminated, not because of her relationship with Captain Swigart, but because she revealed a plan by members of ACA management to improperly funnel the airline's money to members of the ALPA union through flight loss compensation. Ms. Platone believes that Jeff Rodgers asked her to back off of the "flight loss" abuse issue because the company was using it as bargaining leverage for upcoming negotiations with ALPA. Ms. Platone maintains that the flight loss bills had not been sent to ALPA in many months because management was hoping that by allowing some of the ALPA leadership to get away with receiving improper flight loss compensation, ALPA would be more willing to make concessions during the upcoming negotiations. At the time, all airlines were still feeling the repercussions of September 11th, and ACA was determined to launch its new low-fare airline. As a result, Ms. Platone believed the airline was "desperate" to extend its contract with United Airlines, which had filed for bankruptcy in December 2002. Mr. Moore and Mr. Rodgers testified that cutting costs was crucial to the future of ACA; the best way to cut costs, according to Ms. Platone, is to cut labor expenses through concessions from the unions.[13] Ms. Platone believed that in order to cut labor costs, members of ACA management, including Mr. Rodgers, were willingly trading improper "flight loss" compensation for ALPA concessions. Ms. Platone believed this course of action to be in direct conflict with the best financial interests of the company.

On March 19, 2003, Ms. Platone's employment with ACA was officially terminated. At the time of the hearing, Ms. Platone was still unemployed.

ISSUES

1. Whether the Complainant qualifies as an "employee" of the Respondent under the terms of the Sarbanes-Oxley Act.

2. Whether the Complainant engaged in activities that are protected by the Sarbanes-Oxley Act.

3. Whether the Respondent, actually or constructively, knew of, or suspected, such activity.

4. Whether the Complainant suffered an adverse personnel action.

5. Whether the Complainant's activity was a contributing factor in the adverse personnel action that was taken against her.

6. Whether the Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse personnel action regardless of whether the Complainant had engaged in protected activity.

[13] Mr. Rodgers testified that pilots' salaries contributed to over 50% of the company's total wages; coupled with flight attendants, ACA pilots' salaries amounted to $120,000,000 in 2003.

DISCUSSION

The Sarbanes-Oxley Act states in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee - -
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by - -
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)

18 U.S.C. § 1514A (a)(1); see also 29 C.F.R. § 1980.102(a), (b)(1).

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). Because of its recent enactment, the Sarbanes Oxley Act lacks a developed body of case law. As the whistleblower provisions of Sarbanes-Oxley are similar to whistleblower provisions found in many federal statutes, it is appropriate to refer to case authority interpreting these whistleblower statutes.

The Complainant is Covered under the Sarbanes-Oxley Act

The Sarbanes-Oxley Act provides whistleblower protection to "employees" of publicly traded companies. The Respondent argues that the Complainant was an employee of ACA, which is not publicly traded, but not of ACAI, its holding company, which is publicly traded. The interim regulations provide that the term "employee" includes an "individual presently or formerly working for a company or company representative, an individual applying to work for a

company or company representative, or an individual whose employment could be affected by a company or company representative." Title 29 C.F.R. § 1980.1. "Company," in turn, is defined as any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) as well as any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); "company representative" means any officer, employee, contractor, subcontractor, or agent of a company.

In this case, although ACAI and ACA are undeniably separate corporate entities, I find that for purposes of determining whether the Respondent is properly charged, and whether Ms. Platone qualifies as an "employee" of the Respondent under the Sarbanes-Oxley Act, that the existence of separate corporate identities does not insulate the Respondent from liability. The record is replete with examples of various documents that use the two corporate logos and titles interchangeably. While the Respondent argues that this is merely a matter of convenience, the documents in the record lead to the inescapable inference that ACAI made a calculated business decision to use the two corporate names interchangeably. Thus, the Complainant received her offer of employment on letterhead that bore the ACAI logo. The Complainant's 401k plan is administered by ACAI. The Complainant was provided with a confidentiality agreement on ACAI letterhead "in connection with your employment relationship with the Company." The Complainant's employee benefits, including health and life insurance, were provided by ACAI. Her expense reports were submitted on forms that bore the logo of both ACA and ACAI. Personnel action forms were under the ACAI logo. These examples lead to the conclusion that ACAI held itself out as the entity ultimately responsible for ACA's actions.

Additionally, there is a great degree of commonality between the senior management of the two corporate entities. Thus, the Chairman and CEO of ACA, Kerry Skeen, is also the Chairman of the Board of ACAI. According to Michelle Bauman, Mr. Skeen has the authority to hire, fire, promote, or demote anyone within ACA's management. The President and CEO of ACA, Thomas Moore, is also a member of the ACAI Board of Directors; he is the direct supervisor of the labor relations department at ACA. Mr. Moore, along with Mr. Davis, Ms. Bauman, and Mr. Steindler, made the ultimate determination that the Complainant should be fired.

Clearly, ACAI and ACA made no attempt to keep their corporate identities separate in their day to day dealings with the public, with their employees, and with the SEC. Indeed, the Complainant's initial offer of employment was from ACAI, on ACAI letterhead. In its filings with the SEC, and in its press releases, ACAI promotes itself as an entity that provides flight service nationwide, services that are in fact provided by its subsidiary, ACA. It was not an accident that the corporate names were used interchangeably, and I find that the record supports the inference that Respondent perceived a business advantage in using these identities interchangeably. The Respondent cannot now be heard to complain that liability for the dismissal of the Complainant is solely attributable to its subsidiary, and that it shared no part in that action.

It is a general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries, and the mere fact of a parent-subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate. *United States v. Bestfoods, et al.,*

524 U.S. 51, 61 (1998). However, the law also recognizes that a parent corporation will be held responsible for the obligations of its subsidiary to third parties, when the subsidiary is a mere instrumentality of the parent corporation. Thus, where the evidence is sufficient to show that a parent corporation controls the subsidiary to such a degree as to make it a mere instrumentality, courts have held the parent corporation liable for the subsidiary's actions, as constituting the parent corporation's act accomplished through a controlled agency. *See, Liability of Corporation for Torts of Subsidiary,* 7 A.L.R.3d 1343.

Factors considered by the courts in determining whether a subsidiary is a mere instrumentality of the parent, such that the parent is liable for the acts of its subsidiary, include the existence of common stock ownership; common officers or directors; common business departments; filing of consolidated financial statements and tax returns; parent financing of the subsidiary; parent causing incorporation of the subsidiary; operation of the subsidiary with grossly inadequate capital; payment by the parent of salaries and other expenses of the subsidiary; sole source of business for the subsidiary is the parent; parent uses the subsidiary's property as its own; daily operations of the two corporations are not kept separate; and the subsidiary does not observe basic corporate formalities. *See, citing U.S. v. Gulf Park Water Co., Inc.,* 972 F.Supp. 1056 (S.D. Miss. 1997). In addition, when one corporation holds its subsidiary out as a department of its business, or represents that it stands behind it, such is a factor to be considered in determining whether to disregard the separate entity of the subsidiary.

In this case, ACAI, as a holding company, has no employees. It has one subsidiary, ACA, which is its operating arm.[14] ACAI and ACA share officers, and indeed, one of its Board members, who was also the President and CEO of ACA, made the ultimate decision to terminate her employment.

ACAI itself has disregarded the separate identity of its subsidiary ACA in its dealings with the public, with the SEC, and with its employees. ACAI cannot now be heard to argue that it is not liable for the acts of ACA. I find that ACAI, for purposes of this proceeding, is the alter ego of ACA, that it certainly had the ability to affect Ms. Platone's employment, and that Ms. Platone is properly considered as an employee of ACAI for purposes of liability under the Sarbanes-Oxley Act.

Merits of the Claim

In a Sarbanes-Oxley whistleblower case, the Complainant must establish by a preponderance of the evidence that: (1) she engaged in protected activity as defined by the Act; (2) her employer was aware of the protected activity; (3) she suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. *Macktal v. U.S. Dep't of Labor,* 171 F.3d 323,327 (5th Cir. 1999). The foregoing creates an inference of unlawful discrimination, and with respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation.

[14] ACAI formerly owned a company called AC Jet, but this subsidiary is now defunct.

When a whistleblower case proceeds to a formal hearing before an Administrative Law Judge, a complainant must demonstrate by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable action alleged in the complaint. *See, Trimmer v. U.S. Dep't of Labor,* 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Dysert v. Sec'y of Labor,* 105 F.3d 607, 609-10 (11th Cir. 1997). Once a complainant meets this requirement, she is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.

In *Marano v. Dep't of Justice,* 2 F.3d 1137 (Fed. Cir. 1993), interpreting the whistleblower protections of 5 U.S.C. § 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Id. a t 1140 (citations omitted).

If the Complainant meets this burden of proof, the Respondent may avoid liability by presenting evidence sufficient to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. *Yule v. Burns Int'l Security Serv.,* Case No. 1993-ERA-12 (Sec'y May 24, 1995). While there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is higher than a preponderance of the evidence, but less than beyond a reasonable doubt.

If the Respondent is able to meet this burden, the inference of discrimination is rebutted. In order to prevail, the Complainant must show that the rationale offered by the Respondent was pretextual, i.e., not the actual motivation. *Overall v. Tennessee Valley Auth.,* Case No. 1997-ERA-53, ARB Nos. 98-111, and 128 (ARB April 30, 2001). As the Supreme Court noted in *St. Mary's Honor Ctr. V. Hicks,* 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination.

Protected Activity

"Protected activity," as defined under the Act and regulations, includes providing to an employer information regarding any conduct which the employee reasonably believes constitutes a violation of various fraud provisions of Title 18 of the U.S. Code (18 U.S.C. §§ 1341, 1343, 1344, or 1348), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. The statutory language makes it clear that the Complainant is not required to show that the reported conduct actually constituted a violation of the law, but only that she reasonably believed that the Respondent violated one of the enumerated statutes or

regulations. The standard for determining whether the Complainant's belief is reasonable involves an objective assessment.

Here, the Complainant argues that she engaged in protected activity by reporting her suspicions to her supervisor, Mr. Rodgers, and later to Michelle Bauman, including her suspicions that Mr. Rodgers, as well as ACA management, were complicit in a scheme to improperly compensate ALPA members, in an effort to obtain cost concessions in contract negotiations. The Respondent argues that the issues of flight pay loss raised by Ms. Platone were exclusively internal to ACA (Respondent's brief at 28), and alternatively, that the true victims of any such scheme are ALPA and its members, and that this was an internal union issue (Respondent's brief at 34). The Respondent also attempts to minimalize the effect of such a scheme, arguing that Ms. Platone only uncovered information about four pilots.[15]

At the time that the Complainant began looking into the issue of flight pay loss, and when she conveyed her suspicions to Mr. Rodgers and Ms. Bauman, the Respondent was in the initial stages of crucial contract negotiations with ALPA. The Respondent, as were other airlines, was feeling the effects of September 11, and was preparing to launch a new low-fare airline. Indeed, both Mr. Moore and Mr. Rodgers testified that it was critical to the future of ACA to cut costs. According to the Complainant, whose testimony on this score was not contradicted, ACA's major expenses of aircraft and fuel are relatively fixed. Labor is the only cost factor within the immediate control of the airline. The Complainant suspected that ACA management was attempting to improperly channel money to senior members of ALPA, indeed those who would represent ALPA in the upcoming contract negotiations, in order to convince these union officials to make contract concessions that would favorably affect ACA's bottom line.

Viewing the evidence as a whole, and factoring in my determinations on the credibility of the various witnesses at the hearing, I find that the Complainant's suspicions were reasonable, and that she had good grounds to believe that a fraud was being perpetrated on the airline as well as ACAI's stockholders.[16] Not only did the company documentation assembled by the Complainant support such an inference, but the events surrounding her disclosure of her findings to Mr. Rodgers, and her attempts to follow up on her suspicions, buttress a conclusion that she had indeed uncovered fraudulent activity.

The Complainant first became aware of possible problems with flight pay loss in September 2002, when Tiffany de Ris, ACA's Manager of Crew Resources, informed her of discrepancies between ACA's and ALPA's records of pilots' hours. At that time, the Complainant told Ms. de Ris to hold off on further investigation while she looked into it. She then learned that ACA had not billed ALPA for flight loss since May 2002. The Complainant discussed the fact of the discrepancies with Mr. Rodgers and Ms. Yingling in October 2002, and Ms. Yingling and Ms. Platone were to set up a system to track flight loss. Mr. Rodgers expressed concern about the issue, and supported the Complainant's efforts to set up a tracking system. Over the next month, she regularly reported to Mr. Rodgers on her findings. She also

[15] Of course, these were the only records that Ms. Platone had been able to assemble on her own; she was not provided with the records that she requested.

[16] The statutes referred to in the Sarbanes-Oxley Act encompass mail, wire, bank, and securities fraud.

discussed these discrepancies with Chris Thomas, the newly elected MEC chairman, in October 2002.

I find that it is reasonable to infer that over the course of several months, as she attempted to set up a system to track flight loss as she had been instructed, the Complainant tracked and documented what appeared to her to constitute an abuse of the flight pay loss system by ALPA members. Although she was not provided with the records she requested from the crew resources department in a timely manner, she was able to obtain and review some of these records on her own. Her conclusions focused on members of the Master Executive Council, whose cooperation was a key element in the upcoming concessionary negotiations.

The Complainant discussed her findings with Mr. Rodgers, and on March 3, sent e-mails to Mr. Rodgers and Jennifer Schep, the Director of Crew Scheduling. Although she had not forwarded this information to Captain Thomas, and indeed had been specifically instructed by Mr. Rodgers not to relay her discoveries to him, Captain Thomas came to the Complainant's office the next day to ask her what she was doing, and why she was so "hot" on the flight pay loss issue.

I did not find Mr. Rodgers to be a credible witness. I had the opportunity to observe his presence and demeanor at the hearing, and I find several aspects of his testimony to be suspect. He essentially denied any conversation with the Complainant that was not memorialized in a letter or e-mail. Thus, he claimed that the first time he ever heard anything about flight pay loss was on March 3, 2003, when the Complainant sent him an e-mail asking for his input on the issue. I find that it strains credulity to accept that the Complainant, who reported to Mr. Rodgers on almost a daily basis, did not report her discoveries to him as she claimed.

The fact that Captain Thomas confronted the Complainant the day after she sent her e-mails to Ms. Schep and Mr. Rodgers certainly suggests that someone in the company told him what the Complainant was doing, and that he was not pleased.

Nor do I accept Mr. Rodgers' testimony that he did not instruct the Complainant to draft a letter to ALPA leadership setting forth ACA's position on flight pay loss. The Complainant did not write this letter out of the blue, and it is reasonable to infer that her drafting of the letter was triggered by instructions from her supervisor, Mr. Rodgers. Amazingly enough, although the Complainant forwarded her draft to Mr. Rodgers on March 6, 2003, he testified that he did not discuss it with Captain Thomas in their meeting, in spite of the fact that Captain Thomas had confronted the Complainant just two days earlier about her pursuit of this issue. Nor did Mr. Rodgers inform the Complainant about this meeting, which also included Michael Rops, a senior ALPA leader, whose time records and bid sheets the Complainant had targeted for review. According to Mr. Rodgers, the three of them discussed a few unspecified problems that ALPA was having with the Complainant, but the subject of flight pay loss was not discussed in this meeting. I find that Mr. Rodgers' testimony is not credible, especially given his comments to the Complainant on Monday, March 10, that the pilots were upset because she was harping on billing issues.

Although he had initially encouraged the Complainant to pursue this issue, and instructed her to draft the letter, the next day, after his meeting with Captain Thomas and Captain Rops, Mr. Rodgers told the Complainant that he was not interested in sending the letter. The Complainant asked if she could "take another stab" at writing the letter, but he told her not to bother. He told her that there was no evidence of intentional wrongdoing, and that any potential flight loss was strictly an internal ALPA issue. He did not tell her about the meeting with Captain Thomas and Captain Rops. The Complainant sensed that she had struck a nerve; and, the factual circumstances suggest that she was correct.

Although she had presented documentation to support her suspicions, Mr. Rodgers summarily brushed her off. A review of the draft letter prepared by the Complainant shows that it did not accuse any specific persons of wrongdoing, but reminded ALPA of its obligations under the contract. Whether it was intentional wrongdoing or not, it was a problem that was costing ACA between $20,000 and $25,000 a month, and an issue that deserved attention.[17] It was not an internal ALPA issue, as Mr. Rodgers attempted to suggest at the hearing: improper flight loss claims came directly out of ACA's bottom line. Moreover, for a scheme involving improper flight loss claims to succeed, it was necessary, at the least, for ACA management to look the other way while the company was being defrauded.

The more rational inference to be drawn from the sequence of events is that the issue of flight pay loss **was** discussed by Captain Thomas, Captain Rops, and Mr. Rodgers on March 6, and that, in view of the upcoming concessionary contract negotiations, Mr. Rodgers agreed that nothing further would be done on the issue. Although the amounts of money at issue are significant, the Respondent presented no testimony that the flight pay loss discrepancies were ever resolved, or that ACA has billed ALPA for the arrearages in flight pay loss. Nor was there any testimony or evidence that the tracking system designed by Ms. Platone and Ms. Yingling, which would have prevented future abuses of the flight pay loss system, was ever implemented at ACA.

I find that Ms. Platone's sense that she had struck a nerve was eminently reasonable, and that she had a rational and reasonable basis for her belief that Mr. Rodgers, and perhaps others at ACA, were complicit in a scheme to compensate pilots improperly, in hopes of gaining contract concessions. Such a scheme, by its very nature, would involve the use of the mail and wires, and could constitute fraud on the ACAI shareholders. Contrary to the Respondent's argument, I find that a reasonable person would equate the manipulation of flight pay loss as a form of fraud against the Respondent, whose sole source of revenue was through ACA, or its shareholders. Thus, I find that Ms. Platone engaged in protected activity under the Sarbanes-Oxley Act when she reported her suspicions to Mr. Rodgers, and then to Ms. Bauman.

Respondent's Knowledge of Complainant's Protected Activities

[17] Mr. Rodgers testified that it was not possible to determine if the pilots involved were acting deliberately. However, given the information uncovered by the Complainant, as well as the potential loss involved, I find that the Complainant's concerns were reasonable, and deserved further investigation. Furthermore, the Complainant had concentrated her attention on instances where the union meetings were scheduled before "swap and drops" occurred, suggesting willful action on the part of the pilot.

The Respondent argues that it was not aware of the Complainant's concerns about the flight pay loss issue, as required by the Sarbanes-Oxley Act, because the persons responsible for making the ultimate decision to terminate her were not aware of her allegations. The Complainant is not required to prove "direct personal knowledge" on the part of the employer's final decision-maker that she engaged in protected activity. The law will not permit an employer to insulate itself from liability by creating "layers of bureaucratic ignorance" between a whistleblower's direct line of management and the final decision-maker. *Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 166 (D.C. Cir. 1982). Therefore, constructive knowledge of the protected activity can be attributed to the final decision-maker. *Id.*; *See also Larry v. Detroit Edison Co.*, No. 86-ERA-32, ALJ Dec. and Order at 6, October17, 1986; *Barlik v. TVA*, 88-ERA-15, Sec. Final Dec. and Order, Apr. 7, 1993.

Clearly, Mr. Rodgers was aware of the Complainant's allegations with respect to the flight pay loss issue. Ms. Platone testified that she informed Ms. Bauman of her suspicions, although Ms. Bauman recalled that the issue of flight pay loss was brought up only briefly. However, the contemporaneous notes of Ms. Davis, who was also present at the initial meeting with Ms. Platone, reflect that the subject came up at least three times. Again, I find that Ms. Platone's testimony on this issue is credible, and it is supported by Ms. Bauman's testimony, as well as Ms. Davis' notes. Therefore, I find that Ms. Bauman and Ms. Davis, who were part of the group that debated whether to terminate Ms. Platone, were aware of her allegations.

However, there is no evidence that the issue of flight pay loss was discussed in subsequent meetings or discussions on Ms. Platone's fate. Thus, there is no evidence to suggest that Mr. Moore, who made the final decision to terminate Ms. Platone, knew of her allegations. But I find that the group that made the decision to suspend and terminate, and Mr. Moore, who ultimately carried out that decision, did not act independently of Mr. Rodgers, who initiated the process by notifying Ms. Bauman that the Complainant had complained of workplace hostility, and who also advised Ms. Bauman of the relationship between the Complainant and Captain Swigart. In effect, Mr. Rodgers planted the seeds for the Complainant's dismissal, being careful not to taint any other person among the group that debated Ms. Platone's fate with any knowledge of her protected activities. Mr. Rodgers actively participated in the discussions and decisionmaking regarding the Complainant's future employment. Under these circumstances, I find that it is appropriate to attribute constructive knowledge of the Complainant's protected activity to the ultimate decision-makers.

Adverse Action

There is no dispute that the Complainant suffered an adverse employment action – she was suspended and then terminated. Therefore I find that the Complainant has established that she suffered an adverse employment action at the hands of the Respondent.

Contributing Factor

I find that it is reasonable to draw the inference that, when Captain Thomas telephoned Captain Swigart on March 8, 2003, to tell him that ACA was investigating the Complainant, and reviewing her telephone records, Mr. Rodgers, or someone else at ACA, was already looking for

a reason to fire her. Captain Swigart provided this excuse when he telephoned Mr. Rodgers and told him that he and the Complainant were dating. Interestingly, when the Complainant met with Mr. Rodgers the following Monday, he told her that ALPA was complaining about her "harping" on billing issues, and felt she was being obstructive, and that ALPA no longer wished to work with the company while she was employed there. But he did not bring up her relationship with Captain Swigart until the next day.

As noted above, I did not find Mr. Rodgers to be a credible witness, and I do not accept his testimony that he knew nothing of this relationship until March 8, 2003. Captain Swigart testified that, in his role as the MEC Chair, he dealt on a daily basis with Mr. Rodgers, who was his contact person at ACA. According to Captain Swigart, whose testimony I credit over that of Mr. Rodgers, Mr. Rodgers helped him get into training classes when he learned that Captain Swigart planned to step down as the MEC Chair, and even discussed the possibility that Captain Swigart might come to work for ACA. According to Ms. Platone, whose testimony I also credit over that of Mr. Rodgers, when she was interviewing for her position with ACA, Mr. Rodgers repeatedly asked her about Captain Swigart's future plans. Under these circumstances, I find it inconceivable that Mr. Rodgers did not know the nature of the relationship between Ms. Platone and Captain Swigart.

But even if I were to conclude that Mr. Rodgers was completely ignorant of this relationship, I still find that the Complainant did in fact touch a nerve with her investigation of the flight loss pay issue, and her allegations were in fact a contributing factor in her dismissal. Based on the rapid sequence of events, as well as the Complainant's testimony, I conclude that ALPA objected to the Complainant's investigation which, if her suspicions were correct, would result in the termination of a practice that provided its pilots who were union representatives a significant source of additional income, and could possibly result in their termination. ALPA made these objections known, and virtually overnight, Mr. Rodgers, who had encouraged the Complainant in her investigation, and directed her to prepare a letter to ALPA, lost all interest in pursuit of the issue. ALPA made its position clear: it would not work with the company as long as the Complainant was employed.[18] In other words, ALPA did not want the issue of flight pay loss pursued, and they did not want the Complainant in a position to continue pursuing it. All of this occurred in the context of extremely crucial concessionary negotiations that were scheduled for March 11, 2003, negotiations that, according to the Complainant, were unexpectedly cancelled.

Here, as in most cases of discrimination or retaliation, there is no direct evidence of intent. However, a complainant is not required to demonstrate specific knowledge that the respondent had the intent to discriminate against her. Instead, a complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. *See, Frady v. Tennessee Valley Authority,* 92-ERA-19 and 34 (Mar. 26, 1996); *Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159, 1162 (9th Cir. 1984).

[18] On March 7, shortly after he told the Complainant that he did not want to send her draft letter, Mr. Rodgers told her to remove the union negotiating committee members from the flight schedule for the following week, which is when concessionary negotiations had been scheduled to begin. Captain Thomas called the Complainant the following Tuesday and demanded that these pilots be placed back on the flight schedule, stating that the union had nothing further to discuss with the company at this time. The negotiations were subsequently cancelled.

The Board has noted that where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact-finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action. The Board noted that there will seldom be eyewitnesses to an employer's mental process, and that fair adjudication of whistleblower complaints requires a full consideration of a broad range of evidence that may prove or disprove a retaliatory animus, and its contribution to the adverse action. *See, Timmons v. Mattingly Testing Services,* 95-ERA-40, 5-7 (ARB June 21, 1996).

The Secretary has noted that, when addressing a complainant's proof of a prima facie case, one factor to consider is the temporal proximity of the adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.,* 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Instant Oil Change, Inc.,* 91–SWD-4 (Sec'y Jan. 5, 1993). Findings of causation based on closeness in time have ranged from two days (*Lederhaus v. Dona Paschen Midwest Inspection Service, Ltd.,* 91-ERA-13 (Sec'y Oct. 26, 1992), to about one year (*Thomas v. Arizona Public Service Co.,* 89-ERA-19 (Sec'y Sept. 17, 1993). On the other hand, the lack of temporal proximity is a consideration, especially where there is a legitimate intervening basis for the adverse action. *Evans v. Washington Public Power Supply Sys.,* 95-ERA-52 (ARB Jul 30, 1996).

Furthermore, the plaintiff need not proffer direct evidence that unlawful discrimination was the real motivation. Instead, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products, Inc*, 120 S.Ct. 2097, 2108 (2000).

Both Captain Swigart and Mr. Rodgers testified that, during their telephone conversation on March 10, Mr. Rodgers did not express any surprise when he was informed by Captain Swigart about his relationship with the Complainant. According to Ms. Bauman, Mr. Rodgers left her a voice mail message, but it did not include anything specific about this relationship. When the Complainant met with Ms. Bauman on March 12 to discuss her accusations of hostility, nothing was said about her relationship with Captain Swigart. Nor was the Complainant given a reason for her suspension the following day.

I do not accept Mr. Rodgers' testimony that the issue of flight pay loss abuse played no role in the decision to terminate the Complainant. Again, I did not find Mr. Rodgers' testimony to be credible. I conclude that flight loss was indeed discussed during Captain Thomas' and Captain Rops' visit to Mr. Rodgers' office on Monday, March 12, and that Captains Thomas and Rops expressed their unhappiness at the fact that Ms. Platone was looking into the flight loss issue. Indeed, they were so unhappy that they told Mr. Rodgers to put them back on the flight schedule the following day, which meant that the scheduled concessionary talks were cancelled.

I find that, faced with this situation, Mr. Rodgers decided to use Captain Swigart's disclosure to his advantage, to get rid of Ms. Platone, who had become a liability in the ongoing negotiations. While Ms. Platone's relationship with Captain Swigart may well have constituted a sufficient and lawful reason to fire her, I find that Mr. Rodgers' motivation in initiating the

process that ultimately led to Ms. Platone's dismissal was to prevent her from pursuing the flight loss issue.

Legitimate Nondiscriminatory Rationale for Adverse Action

I find that Complainant has demonstrated that her protected activity contributed to the Respondent's adverse employment action, and thus the Respondent has the burden to produce evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. The Complainant cannot prevail if the Respondent shows by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. In this case, the Respondent has put forth a nondiscriminatory rationale to justify terminating the Claimant—i.e., the Claimant's undisclosed relationship with Captain Swigart.

There is evidence in the record that ACA has employed spouses in the past, and in fact there is no specific prohibition in ACA's handbooks against such employment. Mr. Christy testified that he knew of romantic relationships between labor and management at ACA, and in his many decades with the union, he had never heard of anyone being fired for such a conflict. The difference in this case is that Ms. Platone's position was created to establish a point person for ACA's dealings with ALPA; by its very nature, the position involved access to extremely sensitive information. Clearly, this was a position of trust. Indeed, in her hiring interviews, Ms. Platone was questioned closely about her ability to "switch sides," and give her loyalty to her new employer.

While the Respondent presented much evidence at the hearing purportedly establishing that Ms. Platone had breached the trust placed in her, I find that this evidence is irrelevant. The Respondent presented no evidence of any instance where Ms. Platone violated her obligations to her employer, and in fact she was not suspended or terminated for any reasons related to her performance.

Nor is it relevant that Captain Swigart was not in union leadership, or that he was on the outs with Captain Thomas, the MEC Chairman. The Claimant argues that she was not in a position to pass information to the union through Captain Swigart, and thus their relationship presented no conflict of interest. However, this misses the point—the Respondent clearly was concerned about Ms. Platone's ties to the union when she was hired, and the potential for future disclosure of sensitive information to a person with strong past ties to the union. The fact that she did not disclose her relationship with Captain Swigart, who up until October 2002 had been the MEC Chairman for many years, was a legitimate point of concern for the Respondent.

While the Claimant may feel that there was no actual conflict of interest, in that she had been and was able to perform her job, the Respondent perceived a breach of trust in her failure to disclose this relationship, as well as a conflict of interest in her continued ability to be loyal to her employer. I cannot substitute my business judgment for that of the Employer, or second-guess whether that decision was correct. I find that the Respondent had a legitimate, non-pretextual reason for dismissing Ms. Platone: her failure to disclose her relationship with Captain Swigart.

This does not, however, end the inquiry. Under the dual or mixed motive analysis, when the evidence establishes that discriminatory intent played a role in an adverse action, the employer may avoid liability only by demonstrating by clear and convincing evidence that the action would have been taken on the basis of a legitimate motive alone. The dual motive test comes into play if, as here, the complainant establishes a prima facie case, and there is evidence of both legitimate and improper motives for the adverse action. The employer bears the risk that the influence of legal and illegal motives cannot be separated. In a dual motive analysis, it is the employer's motivation that is under scrutiny. It is not enough that the evidence proves that the employer, in retrospect, made its employment decision on legitimate grounds.

Here, I find that it is not possible to separate the legitimate and the improper motives for Ms. Platone's suspension and termination. The decision to terminate Ms. Platone was debated and ultimately made by a small group of persons, including Mr. Rodgers. I accept Ms. Bauman's testimony that Ms. Platone's allegations about flight pay loss did not play a part in her decision-making, and that the other members of this group, with the exception of Mr. Rodgers, were not aware of these allegations. But Mr. Rodgers got the train rolling, and he played an integral role in seeing that it reached its destination. I find Mr. Rodgers' testimony about performance issues, and his vague suggestions that there was a groundswell of discontent with Ms. Platone, to be self-serving and unpersuasive. I find that Mr. Rodgers initiated the process that resulted in Ms. Platone's suspension and termination, and made sure that it took place, in order to remove what he perceived as an obstacle to successful cost-cutting concessionary negotiations with the union.

Under these circumstances, I find that the Respondent has failed to meet its burden to show by clear and convincing evidence that it would have suspended and terminated Ms. Platone on the basis of her relationship with Captain Swigart alone, and thus the Complainant is entitled to relief under the Act.

CONCLUSION

Whether the Respondent actually violated, or intended to violate, any federal fraud statute or SEC ruling is not, and never has been, an issue in this case. All that the Sarbanes-Oxley Act requires is that the Complainant *reasonably believed* that the Respondent engaged in such conduct, that she disclosed that conduct to the Federal authorities or to her employer, and as a result, she suffered an adverse employment action. Title 18 U.S.C. § 1514A(a). For all of the reasons set forth above, I find that the Complainant has demonstrated by a preponderance of the evidence that she was suspended and fired by the Respondent because she had uncovered and reported what she reasonably believed to be a pattern of improper flight loss payments to employees. In rebuttal, the Respondent has relied on the Complainant's failure to disclose her relationship with a fellow employee and past union representative to justify its dismissal of the Complainant. However, I find that the Respondent was also motivated by the Complainant's discovery of possible financial improprieties, and that the Respondent has failed to produce sufficient evidence to clearly and convincingly establish that its motive for firing the Complainant was unrelated to her protected activity.

REMEDIES

The Sarbanes-Oxley Act provides that any employee who prevails in an action under the whistleblower provision of the statute shall be entitled to all relief necessary to make the employee whole. Relief under the Act includes reinstatement, back pay with interest, and compensation for any damages sustained, including litigation costs, expert witness fees, and reasonable attorney fees. Title 18 U.S.C. § 1514A(c)(2)(A)-(C); 29 C.F.R. § 1980.109(b).

The Complainant has indicated that she does not seek reinstatement with ACA. Based on my determination that the Respondent has violated the whistleblower provision of the Act, the Complainant is therefore entitled to back pay with interest payable at the rate established by the Internal Revenue Code. Since no evidence with respect to the Complainant's compensation was introduced during the formal hearing in this matter, the record will be held open for thirty days to allow the Complainant to produce evidence upon which an award of back pay may be calculated. Respondent may respond to any evidentiary submission made by the Complainant within fifteen days from the date upon which it receives the Complainant's evidence. To the extent that the parties believe that an evidentiary hearing is necessary with respect to the award of back pay, they should inform me of their desire for such a hearing immediately.

As a prevailing party, the Complainant is entitled to recover her litigation costs and expenses, including witness fees and reasonable attorney's fees. An itemization of such costs and expenses, including supporting documentation, must be submitted by the Complainant within thirty days from the date of this order. Respondent shall have fifteen days thereafter within which to challenge payment of the costs and expenses sought by the Complainant.

ORDER

IT IS HEREBY ORDERED that the Respondent, Atlantic Coast Airlines Holding Co., Inc., shall:

1. Pay to the Complainant back pay and interest in an amount to be determined by supplemental decision and order based on the parties' submissions as described above.

2. Pay to the Complainant all costs and expenses, including attorney fees, reasonably incurred in connection with this proceeding in an amount to be determined by a supplemental decision and order based on the parties' submissions as described above. A service sheet showing that service has been made upon Respondent must accompany Complainant's application. The petition for services and costs must clearly state (1) counsel's hourly rate and supporting argument or documentation therefore, and (2) a clear itemization of the complexity and type of services rendered.

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge

NOTICE: Pursuant to ¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002), authority and assigned responsibility to act for the Secretary of Labor has been delegated to the Administrative Review Board ("ARB") in review or on appeal of cases arising under the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. The Sarbanes-Oxley Act employee protection provision provides that complaints filed with the Secretary of Labor shall be governed by the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b). Regulations directly governing Sarbanes-Oxley Act whistleblower complaints, however, have not yet been promulgated by the Department of Labor. In light of the absence of clearly governing regulations, the parties are advised that they should preserve their rights of appeal by filing in writing with the ARB, within ten business day of the date of this Decision and Order, any petition for review by the ARB. The ARB's address is Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave, Washington DC 20210. The petition should be served on all parties and on the Chief Administrative Law Judge.